UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES H. ROOF, III, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	DOCKET NUMBER AT07529108591I1 DATE: APR 22 1992

Robbie G. Exley, National Federation of Federal Employees, Washington, D.C., for the appellant.

Robert D. Rosenbloom, Esquire, Homestead Air Force Base, Florida, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant petitions for review of the November 25, 1991 initial decision that sustained his removal. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING the removal action.

BACKGROUND

The agency removed the appellant from the WG-10 position of Aircraft Mechanic Technician based on a charge of "willful and malicious infliction of potentially serious bodily harm upon a co-worker." *See* Appeal File (AF), Tab 5, Subtabs 4a, 4b, 4k. Specifically, the parties stipulated that the appellant sprayed a can of lubricant into the eyes of his co-worker, Sperling, "and that such action had the potential of inflicting serious bodily harm upon him." AF, Tab 11.

The appellant filed a timely petition for appeal with the Board, and the administrative judge convened a hearing in connection with the appeal. The administrative judge then issued an initial decision in which she: sustained the charge against the appellant upon finding that he committed his action after Sperling made a sarcastic remark to him; found his affirmative defense of whistleblower retaliation unsupported; determined that a nexus existed between the sustained misconduct and the efficiency of the service; and, found that the penalty of removal was reasonable. Initial Decision (ID) at 2-11.

The appellant has timely petitioned for review, and the agency has timely responded in opposition to the petition.

ANALYSIS

In his petition for review, the appellant first contends that the administrative judge and the agency's representative, Robert D. Rosenbloom, engaged in an ex parte communication prior to the issuance of the November 25, 1991 initial

decision. Petition for Review File (PFRF), Tab 1 at 1-2. In support of this assertion, the appellant has submitted a copy of a November 19, 1991 letter he wrote to his representative, Robbie G. Exley. *Id.*, Enclosure 2. In the letter he stated that John Breslin, the agency's technical advisor, had told Jose Merino, the appellant's former representative in connection with the appeal, that Rosenbloom had spoken to the administrative judge and told her that he would petition for review if she were to rule against the agency. *Id.* In a "motion for a de novo hearing" accompanying his petition, the appellant "contends that [he] may have been harmed by this ex parte communication as the outcome of the case could have been altered without Union defense." PFRF, Tab 1.

In its response to the petition, the agency categorically denies that the alleged ex parte communication took place between Rosenbloom and the administrative judge. PFRF, Tab 4 at 6. In support of its position, the agency has submitted sworn affidavits from Rosenbloom, Breslin, and Merino. PFRF, Tab 4. In their affidavits, *id.*, Rosenbloom and Breslin deny having engaged in any substantive ex parte communication with the administrative judge. Additionally, Breslin denies having informed the appellant or Merino of such an ex parte communication, and Merino denies having informed the appellant of the same. *Id.*

The Board's regulations provide that an ex parte communication is an oral or written communication between a decision-making official of the Board and an interested party

to the proceeding, when that communication is made without providing the other parties with a chance to participate. 5 C.F.R. § 1201.101(a). Such a communication is not prohibited if it does not involve the merits of the case, or violate rules requiring that submissions be in writing. *Id.*; *Horton v. Department of the Navy*, 47 M.S.P.R. 475, 480-81 (1991).

Here, the appellant has submitted an unsworn letter containing hearsay evidence of an ex parte communication between Rosenbloom and the administrative judge. We find that the appellant's evidence of an ex parte communication is outweighed by the three sworn affidavits, all of which deny that the alleged ex parte communication occurred, and/or that certain alleged statements concerning the purported ex parte communication were made. *See Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981) (assessment of the probative value of hearsay evidence necessarily depends on the circumstances of each case). We conclude, therefore, that the appellant has failed to demonstrate his assertion that a prohibited ex parte communication took place between Rosenbloom and the administrative judge, affecting his substantive rights. *See Horton*, 47 M.S.P.R. at 480-81.

Next, the appellant reiterates the objection he raised below to the testimony of Silvia Sanchez, whom the agency called as a rebuttal witness at the hearing. PFRF, Tab 1 at 2-3; Hearing Tape (HT) 6, Side A. In addition, he has submitted a March 20, 1990 document entitled "Report of

Investigation," pertaining to a matter that is extrinsic to this appeal, which, he maintains, impeaches Sanchez's credibility. PFRF, Tab 1, Enclosure 1.

At the hearing, the appellant testified that he was not offended by Sperling's sarcastic remark, and that he did not intentionally spray him with the lubricant as a result of the same. HT 5, Side A. The agency called Sanchez in rebuttal, who testified that the appellant, immediately subsequent to the event at issue, admitted to her that Sperling had "disrespected" him and that his action was, in effect, a retaliatory act. HT 6, Side A.

The appellant offered no cogent basis for his objection to Sanchez's testimony below, *id.*, and has offered none in his petition. PFRF, Tab 1 at 2-3. We find that Sanchez's rebuttal testimony was properly allowed, because it was material and relevant to the merits of the agency's charge, and of such a nature as to assist the administrative judge in her decision-making. *See Heller v. Department of the Army*, 36 M.S.P.R. 675, 679-80 (1988).

The appellant also maintains in his petition that Sanchez's testimony below was perjured. PFRF, Tab 1 at 2-3. To support this assertion, he has submitted the March 20, 1990 "Report of Investigation", PFRF, Tab 1, Enclosure 1, asserting that he "did not have time to obtain the evidence to discredit the testimony of [Sanchez] as she was not an approved witness in advance of the hearing." PFRF, Tab 1 at 3.

At the time of the hearing, the appellant did not request an extension of time to hold the record open in order for him to counter the alleged surprise of Sanchez's testimony. HT 6, Side A. Therefore, he cannot for the first time be heard to claim surprise in his petition for review. *See Wakeland v. National Transportation Safety Board*, 6 M.S.P.R. 37, 39 (1981). Moreover, we will not consider the "Report of Investigation" at this juncture because he has not shown that it was unavailable before the record closed below despite his due diligence. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Further, evidence offered merely to impeach a witness's credibility is not generally considered new and material. *See Murphy v. Department of Health & Human Services*, 34 M.S.P.R. 534, 536 (1987).

The appellant also asserts that the administrative judge improperly prevented him from pursuing the issue of disparate treatment. PFRF, Tab 1 at 3-4. We find, however, that the administrative judge properly disallowed the disparate treatment claim, raised for the first time at the hearing, because of the appellant's "unexplained failure to timely raise it in the appeal, the prehearing submission, or the prehearing conference." *See* ID at 9 n.10. *See* 5 C.F.R. § 1201.24(b); *Arnold v. Department of Energy*, 36 M.S.P.R. 561, 565 (1988). The appellant, having chosen his representative, is bound by his action. *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981).

Next, the appellant asserts that the administrative judge improperly prevented him from introducing evidence pertaining to his medical condition, a sensitivity to chemicals, as a mitigating circumstance for his action. PFRF, Tab 1 at 3-4. He maintains that he was harmed thereby, because "a major portion of the case was based on [his] medical condition." *Id.* at 3. Again, we find that the administrative judge properly exercised her discretion to exclude the appellant's medical evidence, "because it was not timely submitted to the Board in the prehearing submission or to the agency in discovery." ID at 11 n.11. *See* 5 C.F.R. § 1201.24(b); *Arnold*, 36 M.S.P.R. at 565; *Sofio*, 7 M.S.P.R. at 670. Moreover, the administrative judge found that the medical evidence proffered by the appellant "did not establish a causal connection between his alleged sensitivity [to chemicals] and the misconduct involved here." ID at 11 n.11. The appellant has not shown that determination to be erroneous.

The appellant next asserts that the administrative judge "blatantly chose to ignore the definitions from Black's Law Dictionary" with regard to "willful" and "malicious" intent. PFRF, Tab 1 at 5. To the contrary, the administrative judge set forth and applied the definition of "willful and malicious injury" contained in Black's Law Dictionary 1600 (6th ed. 1990), finding that it "most closely relates to the instant charge." ID at 3-4. We agree that the term "willful and malicious injury" closely relates to the charge herein, as it

required the agency to "prove that the appellant committed an intentional wrong without just cause or excuse." *Id.* at 4. We find that the administrative judge's resort to the definition of that term set forth in Black's Law Dictionary was therefore appropriate.

Finally, the appellant maintains that the administrative judge's failure to allow him to present evidence with regard to disparate treatment prevented him from proving his affirmative defense of reprisal for whistleblowing. PFRF, Tab 1 at 4. The appellant has confused the affirmative defenses of disparate treatment and reprisal for whistleblowing. Although, as we have stated, the administrative judge properly did not allow the presentation of evidence regarding disparate treatment because that affirmative defense was untimely raised, she did allow the appellant to present argument and evidence pertaining to his whistleblower defense, and she fully adjudicated that claim. *See* ID at 6-9. The appellant has not shown any error in this regard, and we will not consider his claim further.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See*

5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

for Robert E. Taylor
Clerk of the Board

Washington, D.C.